

Certain MATERIAL and USEFUL

CONSIDERATIONS

ABOUT

The Laws Positive,

AND

Laws of Necessity,

RELATING

To the unhappy DISTRACTIONS
of y^e then present TIMES. 164 $\frac{3}{4}$.

*By M^r. John Mathewes Somersham Fellow of S^t. Johns Oxon, & Hon^{or}.
Rector of Bore near Basingstoke in Hampshire.*

2 COR. XIII. Vers. 8.

We can do nothing against the Truth, but for the Truth.

1 THES. V. Vers. 21, 22.

*Prove all things, hold fast that which is good; abstain from
all appearance of Evil.*

JAM. III. Vers. 17, 18.

*The Wisdom that is from above, is first pure, then peaceable,
gentle, and easie to be entreated, full of Mercy and good
Fruits, without partiality, and without hypocrisie.*

*And the Fruit of Righteousness is sown in peace of them
that make peace.*

Printed at LONDON, in the Year 1680.

(Cotton MATERIAL and LITIGATION)

CONSIDERATIONS

ABOUT

The Laws Positive.

AND

Values of Property

IN THE

To the unhappy DISTRICTS
of the Western Hemisphere
1843

IN THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA

Printed at London in the Year 1843.

TO HIS REVEREND FRIEND

THEODIDACTUS.

HAVING been much troubled, even to restlessness in my Thoughts, about the tender and dangerous Distractions of these Times, I have often and earnestly besought Almighty God in my Prayers that he would assist me with his Spirit, that I might honestly set my self to seek the Truth, so seeking that I might find it, and finding it, may cheerfully embrace it, and constantly cleave unto it, in what Case or Danger soever I should find it.

To this end I tasked my self to the saddest and severest Meditations my weak Body and intellectuals could undergo, which being, I trust by the guidance of God, resolved into these ensuing Hypotheses, I commit to your judicious and most impartial Censure, being not so fond of mine own fancies, but that I can indure to see them stript stark naked; and if they prove not the Issues of Truth, to disinherit them from ever having farther possession of my Thought: I see not many things, and hear not all, living so remote from any Town where the Tide of Books and Reports flows in; some Pamphlets there are walking about with as much confidence, and finding as good enter-

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entertainment as Truth it self needeth, and with a great deal of less Modesty than it useth to do Pleas, Appeals, Reasons, &c. which, beg the Question I look they should prove, lest me more unsatisfied (rather) than they found me: I have hitherto (perhaps through fondness) more contentment from these Conceptions of mine own, which I intreat you to examin with all Faithfulness and Severity, as knowing you cannot do your self or me greater injury than to flatter me in falsehood, who am come (praised be God) so far towards Wisdom, as heartily to thank him who rebukes me in Love, and lovingly to thank him who refutes me with Reason.

PHILALETHES.

1. Although



1. **A**lthough the King and Parliament assembled together are the most Honourable and Supreme Court of the Kingdom; from whom there is no humane appeal, yet they are still to be look'd upon as a Company of Men, subject to *Infirmities, Passions, and Errors*, as other men are, and therefore may (even were they concur) determin things Evil in themselves. Or else we must grant that no Parliament Acts were ever Evil in themselves, and so needed no Abrogation, but only inconvenient for Time and Occasions, and so needed but suspensions, 'till fit Seasons reinforcing them might return; and if the whole may err in their Determinations, much more may the parts severally, and alone.

2. In so great a Number, it is probable there still will be (as it is certain now there are) some of green Years, slender Parts, and small Experience, little or no Learning either in Arts or Law; and I may add (from the Censures of some part of that Court upon the other) of (at least) *suspected Integrity*, who as they are Chosen by popular Voices, (wherein sinister references oftentimes bear no small sway) so are they probably led in Voting by popular Arguments tending most to Liberty, being incompetent Judges of the Methods and Mysteries of State-Government: Whence it will follow, that where the number of Voices, and not the depth of Argument, carries it; the fittest and justest Propositions may oft be overborn by Number, which cannot be confuted by Reason.

3. As it is true, that no Evil ought to be imagined of the Parliament, so it is as true, that none ought to be imagined of the King; and yet it is not untrue, that

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where

where there is none, the greatest Evil may be suspected; and the greatest may be, where none is imagined.

4. Though no Evil ought to be imagined in the Parliament *conjunctim*, and in the Lump, *viz.* That what the King and both Houses shall fairly and freely conclude, and Enact, will prejudice no man; yet in regard of the particular Members, when I know Evil by them, I may suspect Evil from them: Else, why doth one part of the Parliament, not only suspect, but say so much and so great Evil of the other, whilst they mutually repute each other *Enemies of the State*, which of all civil Evils is the greatest.

5. Where there is a noise of *Extream danger* (which all men fear) and as earnest an undertaking for prevention (which all men desire), it is easie to conceive how ready men will assent, without a due Examination, either of the imminency of the danger, or lawfulness of the prevention, especially men of the weaker sort, not able so well to judge of either.

6. When it is possible, that no one in either House of Parliament may be Learned in the Law, since Noblemen, Knights, Gentlemen, Citizens, and Townsmen, (of which they consist) are not necessary to be so, nor one more than another: I see not how the judgment of the Law can fully and properly reside in them, especially when the King consents not. And so much seems implied by the setting of the Judges in the Lords House, who (for ought I hear) have no other Office there, but to advise, or advertise in point of Law.

7. When it is said, the Judgment of the major part of both Houses is the judgment of the whole Parliament, and consequently of the Kingdom, I conceive it is not rightly affirmed; for besides, that the Judgment of the Clergy is not (so much as in a shadow) there represented (who are a considerable part of the Kingdom, and should be presumed to have as good judgment, and be as good men, as others.) I resign not my Judgment, but promise
Obedi-

Obedience to the Parliament, not barely to the Burgesses of my own Town (whom perhaps I think very unfit) and who were chosen against my will, but to the Result and Determination of both Houses, and not to them only neither, but as all are allowed, confirmed, and perfected, by the King's assent. For I am represented in the Commons but as subordinate to the King, and to joyn with the King, and with the Lords (not with, or against both, or either of them) to make Laws for the good of the Kingdom. So that when the Act is made by the concurrence of all the three Requisite Consents, then (as I suppose, and *not till then*) it becomes Obligatory, and (as a peaceable Subject) I must obey it, if it be lawful before God, though my judgment be still free at home, and I do think it inexpedient, as the Negative part of the Votes do, for it is impossible, and against *Reason* and *Nature*, that any understanding Man's judgment, back'd with strength of Argument, should be led Captive by two or three Votes.

8. The major part of the Houses being the part which exceeds the other but by three or four Voices; shall not that Law, which is concluded only by the advantage of those Voices without the King's consent, be a *Lesbian Rule*, or Nose of Wax, which upon a second Vote may pass the contrary way upon a casual absence, or presence, of so small a Number? The Law is a streight Rule, and always like it self; if such and such a thing be *Law* after it was so Voted by the major part of the Houses, it was *Law* before it was so Voted (unless an absolute Power of Law-making be in such a Vote) and then may be put in Execution without new Voting, only the Law ought to be produced. If the major part of the Votes of both Houses be only *Declarative* of the Law, then in reason the first Voting should stand, or else this would be a very uncertain Rule, and so the case of ordering the *Militia* should not be according to Law, because that was first (and twice) Countervoted by the House of Lords. Such broad
and

and-obvious exceptions bught (in matters of so high concernment) to be fully cleared and removed.

9. When the Question is ; who shall be Judge of the Law , I suppose it must be meant , either of the sence of particular Laws , or of the Latitude and scope of the Laws in general. If of the first , I conceive the sence will appear , 1. Either by the clear Light that it hath in it self (as the Sun shews his own Light). Or , 2. By reference to other Laws or Clauses touching the same Argument , which are more perspicuous. Or , 3. By the usage and practice , which is the life of the Laws. If none of these can make it plain , in my judgment it becomes no Law , but is Obsolete until a full sence be agreed upon again , by that full Authority that first made the Law. Otherwise I see not any Rule for declaring of the Law , that can be always absolutely determinative ; for (besides that the same thing is at divers times diversly Voted) if Votes of either House should chance (as possibly they may) to be equally divided , and the major part of both Houses severally , be necessarily required to determin , where shall the Determination be , when the Votes of One at least be equally ballanced ? Unless we fly unto a third way , viz. That the major part of both Houses in Gross , where the exception lies as full , because they may chance to be equal also. If it be understood of the second , then that Latitude ought to be evinced from some Terms in the Law expressed (which terms are to be produced) and not from the pleasure of any that shall say , That is lawful which seems so to them , especially when they make themselves the sole Judges , both of Law and Equity. For whether will not such a Liberty reach ? A Transition is so made *à Genere ad Genus* , from *Positive Law* , to the *Law of Reason* , and that being various , according to the diversity of Apprehensions , cannot be imposed upon all , where the full Legislative Power is not concurrent. And I conceive it is not properly said , *That in extreme danger , I may by Law do that , which otherwise I may*
not

not do. But, in such a Case, I may do that, and be excused, which by Law I cannot do. As in an Assault, I think the Law does not say, *You may kill a Man*, or take away his Weapon, but if you do it, the Law will not punish you; because it is against all Reason, that where the Law affords me no help, it should not hold me excused for helping my self, when Necessity (which hath no Law) is so pressing, that otherwise I must perish.

10. When Necessity and Extreme Danger, are made the Grounds for (otherwise) doubtful and dangerous Undertakings, it were meet those Terms were rightly defined, that so we might clearly see the soundness of our Warrant. I conceive that to be, when a Man is so presently distressed, that he can make no possible use of any positive Law to help him; and so becomes in a sort disoblig'd from it, and left free to the Law of Nature, which permits every thing to seek the Preservation of it self. This Necessity dispenses with ordinary Duties, both to God and Man; but we must be sure of the Necessity before we assume the Liberty. If a Man steal, and plead Necessity, he shall not be excused, because the Law hath not left him remediless in his Wants. I may not take another Man's Sword from him, because I have reason to fear he will hurt me; nor the Sword I have lent one, though he have threatened to kill me, so long as he draws it not upon me, because I have a Remedy yet by Law, and may bind him to the Peace, &c. (Then much less may I wrest His that hath sworn to defend me.) When Necessity is but supposed, that there is no simple and absolute Necessity is confest; and therefore no Law is (under pretence of Necessity) yet to be violated. The Kingdom may be in danger, and the Danger not extreme, nor any Necessity such, but that it may be preserved by ordinary Defence; or if the Danger be urgent, we may not seek to prevent that without Law, which by Law is well provided for already. In great Dangers, (such as are now supposed) the Kingdom is to be put into a Posture of Defence, against Invasion, domestick Rebellion, or Tumult:

By Law and Custom the King is to order it : And so much is acknowledged by the present Parliament, in their Reply to the King's Answer the 29th of January, (if it be theirs) when speaking of the Forts and Castles of the Kingdom, they have these Words, viz. *We confess the Nomination of any Person to those Places so principal and inseparable a Flower of the Crown, vested in You, and derived to You from Your Ancestors by the Fundamental Laws of the Kingdom, You may reserve to Your Self.* And anon after, speaking of the Militia, they say, *Which Militia also We acknowledge by the Law is subject to no Command, but of Your Majesty, and of Authority derived from You.* Now he carefully applying himself to it, I see not what Necessity or disobliging Extremity can be alledged to dispossess him of it. When he is not convinced to have failed in his Duty; to doubt that he will, is not to prove that he hath, but rather that he hath not done it. If the Enemies were landed, and the Subjects assaulted, (which are many degrees beyond the Dangers when this fell first into Debate) the Ordering of the Defence would be still in the King, (unless where particular Outrages inforce particular Places, for the Defence of themselves, by the *Law of Necessity*, which out-weighs other Laws :) But if the King be regardless of his Trust, and their Safety, and lets the Enemies graze along his Kingdom : Or if any of his Ministers prove false to the State, and either take part with a Foreign, or become themselves a Home-Enemy, and the King strive not to suppress them, or (all which far be it to imagin) do animate and invite them to dispoil his good Subjects; then (and, for ought I know, not till then) is the Danger in Extremity, and then is the first Plea for the Laws of Necessity, which do not only enable the State in common, but every Man in particular, to seek the Preservation of himself and his Country, by all such ways as stand not in opposition to the Laws of God.

II. When I protest to defend the Powers and Privileges in Parliaments, it is but *so far as lawfully I may, and so far as I know them*, or ought to know them, being easie to be known,

known, viz. such as by Custom and unanimous Consent have obtained, as unquestionable; not such as are questioned amongst themselves, some claiming, and others gain-saying; nor such as are challenged *without or against the King*, who, being Head of the Parliament, ought to have Consent in the concluding of Privileges, much less ought he to be unprivileged, without his Consent, whose Privileges are *protected for* (as well as, and) with the rest, and the Defence whereof sworn to in the Oath of Supremacy; where we swear *to our power to assist and defend all Jurisdiction, and Privileges, and Prebeminences, and Authorities, granted or belonging to the King's Highness, his Heirs, &c.* If the disposing of the Forts, Navy, Magazines, and Militia be (as it is confessed they are) by the Law of the Land the *Privileges of the King*, there can be no distinction (to my apprehension) *imagined upon any Fears or Jealousies whatsoever*, (when no Evils by him are actually practised, and all Intentions of Evil are absolutely abjured) to warrant any Men (few or more) in Parliament or out of Parliament (who have taken that Oath) to dispossess him of them, or detain them from him, in *what manner soever he shall come to demand them*: For the Oath is peremptory and unlimited, and *non est distinguendum, ubi Lex non distinguit*. To say they are detained *for him*, (not *from him*) might have some colour, if the King were either a Child, distracted, or weak-minded; but to an adult and understanding Prince, such a pretence is an higher derogation, as disparaging his Wisdom and Fidelity.

12. Where Power is invested in any, and by Custom and free Consent is made Hereditary, I conceive it cannot afterwards be *limited* with other Conditions than at first was agreed on, without the Consent of him that hath it.

13. That which is certainly lawful, and but doubtfully dangerous, is to be chosen rather than that which is *not certainly lawful*, but is *doubtfully dangerous*. When a Man offers no Violence, though (upon good reason) I fear he will hurt me, to let his Sword alone is *certainly lawful*,

though *doubtfully dangerous*; but to wrest it from him, when he offers no Assault, is not *certainly lawful*, but rather *certainly unlawful*, and but *doubtfully safe*, or rather *undoubtedly dangerous*; for by that occasion a Quarrel is made, and Blood shed, which might otherwise (possibly at least) have been saved. Would the Application were not easie.

14. If a Man being illegally dispossess'd of his Right, do (in *Heat of Contention*) use some illegal Means for recovery of it, that is not to be drawn into Argument to justify the Illegality of the first Usurpation. If a Man unassaulted wrest my Sword from me, and I afterwards beat him, he may not draw mine after-beating into Argument to justify his taking my Sword from me.

15. When the Envy of Not yielding to the Advice of his Great Council, is cast upon the King, it is first fit to set the Cause upon its own Legs. It seems by many passages in these *Observations*, and other Books, and by more than Book-passages, that the King is esteemed a Tyrant over his People; for what else is implied in distrusting and vilepending of his Oaths, Obtestations, Imprecations? in imputing the Attendants, and Company he has about him, (whom he owns and protects) *Enemies to the State*? in raising (at least defensive) Arms? in seizing his Navy? shutting the Town-gates against him? and the possessing of his Forts and Magazines against his Command? For will a Man wrest another's Sword from him, if he do not presume he will draw it upon him? Nay, is it lawful to take any Man's Sword, (if not every Body's, then not His) 'till it be drawn upon him, or some violence offer'd him? If it be said, *then it is too late*; it may as well be said, *'till then it is too soon*. Now then, when they are so opinioned and jealous of the King's Love and Fidelity, how can it be imagined, that he should look on them as ingenuous and equal Counsellors, and not be as distrustful of the Sincerity of their Advices? For, how shall I persuade another to be directed by me, as his Friend, when I give him to understand, that I take him for mine Enemy
that

that intends Mischief against me? Especially where the Matter is not of ordinary Concernment, wherein each one's Rights are left free and untouched, but such as trencheth deep into his Majesty's Prerogative, and tendeth not only to the restraining his Power, but mainly also to the quenching of his Honour, whilst by yielding to such Advice, he must tacitly confess that he is not fit to be trusted, and (by consequence) openly proclaim that he is not worthy to be King.

16. If the (so called) Malignant Party should chance to be the prevailing Party in the House, (as the King puts the Case in his Answer to the Declaration of the 26th of May, pag. 8.) and should alledge, *That through the precipitancy of some Mens pretended Zeal, the Kingdom were like to run into confusion*, (for such a Case may be, and *Conspiracy for pretended Reformation* was the Title and Argument of a Book many years since) must these be safely secured? And presuming the King favours that side, and the other Party not liking the course that he will take to secure the Kingdom, should vote it lawful for them to do it themselves without him, must this presently be concluded to be the Judgment of the whole Kingdom, and to be according to Law, when no Law can be produced? and the King to be ill affected to his best Subjects? or to be mislead by evil Counsellors, to undo Himself and his Kingdom, by not yielding to the Advice of his Great Council? Or, Will the adverse Party take it well to be reputed *Enemies to the State, a Malignant Party, &c.*? And if not, it were but meet, that the substantial Differences of the Case were so well opened, that they that desire to know what is Just and Right, might tell where to find it: And that all Men (of moderate Capacity, Judgment, and Ingenuity) might see clearly the Infatibility of One Party, and the Hypocrisie of the Other.

17. When the Forts, Navy, Magazines, Offices, &c. are said to be intrusted in the King, or the King intrusted with them for the Good of the Kingdom, the sense of the

Word [Intrusted] in this place would be well to be cleared. Not to question; Whether the King have those things by way of *Trust from the People*? it will be of all granted (as it is by the King himself) That *God and the Law have trusted him with them*, and that for the good of the Kingdom; and so to employ them, he is further tyed to by his Oath. But there is a twofold Trust; one, that is *absolute and unlimited*, otherwise than that the End is specified, supposed, or presumed; (the End not so much *limitting* the Trust, as the Trust denoting and *implying* the End;) and there is a Trust *conditional*, or *circumscribed* in such sort, that to fail in the performance is to *forfeit* the Trust. The first gives a Man Right to the Thing intrusted, the second gives only a Right to the Trust of the Thing. I conceive the King's Trust is of the first kind; who being presumed to mean all Good to his People, according to the Maxim in Politics, *No Evil ought to be imagined by the King*, hath these things frankly and absolutely committed to his Government and Disposing; and howsoever he shall order them, I suppose he is accountable to no Man, nor questionable by any, unless he clearly, and publicly, and undoubtedly dispose of them to the Ruin of his Kingdom, and so puts the People to an *evident* Extremity; or *lawless* Necessity. If there be any *Limits*, the Law should express them, for he being *Supreme*, there is no other Power to impose them. Neither are the Actions of his Ministers to be censured, unless by them the known Laws have been violated.

If this Trust should be Managed or Regulated by Both Houses of Parliament, first, That Power should be made appear to the King and People; and then there must be either a *Standing Court* of Parliament, or else the Parliament must be called so often as the King shall have occasion to send out Ships, take in, or put out Powder and Ammunition into his Magazines, chuse any Officers, &c. which were absurd to conceive.

If any Man, having confidence in his Friend, should say to him, *Sir, I will freely give my Estate into your hands*, only

only you shall swear you will be a Father to my Children: Here is an Implication of a Trust, yet a clear Right in the Thing; so that he may Let or Set, Build or Pull down, Give or Lend, and yet be accountable to none, nor falsifie his Trust, so long as the Children want nothing. Yea, and if he fail of the Trust, perhaps some Court of Conscience may relieve them; but I believe no positive Law can controll him.

The Case is other with Feoffees, or Executors in Trust, who have a Right only to the Trust, and none to the Thing intrusted, which is only the Heirs, the Poor's, or Legatories of him by whom it was bequeathed.

18. The King's and Subjects Interests are mutual, he refers to every Subject, and every Subject to Him, as the Line from the Center to the Circle; and what Interest he hath in One, he hath in Another, and in All, as well as in Any; and His Interest in them is of a higher Alloy, more Noble, (as Command is, than Subjection,) the Interest of Protection is mutual, the Odds is, that All the People are not more worth than the King, but the King and People more worth than either.

19. Personal Differences of Wisdom or Folly, Weakness or Strength, Courage or Cowardize, Meanness or Excellency of Parts or Arts, make no Difference in the Right of the King, though they shew a great Difference in God's dealing with the Kingdom.

20. When a King plays the Tyrant, or Usurper upon his People's just Liberties, I conceive it must either be, first, by a violent Suppression of Old Laws and Customs yet in force; or secondly, by a wilful Obstruction of Known Laws by force; or thirdly, by wicked Oppression by force without Law. When therefore Tyranny is imputed to, or implied in a Prince, (of whom we ought not slightly to think any Evil) it will become Christians thoroughly to examin upon what point he is convinced, and not take up such Reports upon whole-sale, and in gross.

21. If the King have not a *Negative Voice*, he seems not to have so much Power in Parliamentary Acts as a Common Burgess; for if the Votes be even before, His may be the Casting Voice of the House, and I see not so much as a *Vote* allowed His Majesty.

22. When the King shall think it fit, not to give his Consent to what the major part of the House shall agree upon, He is not barely to be considered as *One Man against so Many*; for (besides His Privy-Council at hand, Men accustomed to, and experienced in Matters of State, and besides, that possibly a very great Number of Both Houses are also of the King's Mind) we are to consider the King, as One best acquainted with the Rules and Mysteries of Government, being as it were the Trade to (and in) which he hath been born, bred, and brought up, and therefore is presumed to see farther into it than many others together, not so acquainted with the Mystery: For (besides that God hath a special way of communicating Wisdom to Kings, in which regard, *A wise Sentence is said to be the Lips of the King*, Prov. xv. 10. and *The Heart of a King is unsearchable*, Prov. xxv. 3.) Histories make it plain, that there are *Arcana Imperii (& Militiæ)* which the King (and Captains) apprehend, which a thousand do not, and which perhaps may not be fit for all Men (nay, not for any Man else) to know. When an adult, and a prudent Prince shall own, and approve of, and protect such and such persons, as his tryed Friends, and known Councillors; if any, under what pretence soever of their supposed suggesting evil Council (when no evil practices are apparent, yea, when such Practices and Councils are utterly disavowed and abjured by the King) shall presume not only without the King's consent, but against his express Commands to take up Arms, and to destroy and take off such persons, though no Evil be intended against his person (and yet who can tell what is in his mind that comes towards a Man with a drawn Sword in his hand?) I see not what distinction can help, but that such Arms are

are taken (not for, but) against the King: Otherwise how can any thing be said to be *Against God*? Who being inviolable in his Person, cannot otherwise be resisted than by the blaspheming of his Name, breaking his Commands, rejecting his Motions, prosecuting and persecuting his Servants, &c.

23. When it is said, the *King was made for the People*, and not the People for the King; (besides, that the Comparison is as idle, as that of the Members *Against the Belly*, in the Apologue, and the Apostle hath met with it, 1 Cor. xii. It is also not absolutely true, for *The King was no more made a Man for Others*, than *They for Him*, nor made a King more for the Good and Safety of the People, than *They were put into such a posture of Obedience, and Order*, that *He might be safe, as well as they*; yea, rather than *Any* (if not than *Many*) of *them*, as being supposed the Chiefest amongst them.) The sence, in which it seems best to hold, is, *That the King was made for the need, and necessity of the People, and not They for His*, viz. He can more securely be no King, than They can be without a King. And he takes the *Surrender of their Power*, with their dependances and consequences, not as a kindness from Them, but as doing a kindness to Them, as is implied in the Refusal of the Vine, Fig-Tree, and Olive-Trees, in *Jotham's Parable*, Judg. ix. 7. &c. and the Story of *Jephtha*, Judg. xi. 4. &c. for, on Him they unload their Cares and Fears, who foregoes His own Ease and Quiet, that He may procure it for His People: Himself taking Care that All Men else may live without Care. Now, on Whom the necessity lyeth most, on them lyeth the Greatest Obligation and Respect, Therefore St. Paul requires *Giving of Thanks for Kings*, 1 Tim. ii. 2. So we may say of a Captain, a Pilot, a School-Master, a Physitian, that they were made for the need of their Correlates, which should render them more Honourable, and rather draw *Respects to them*, than Challenge *Greater Observances from them*.

Judge Righteous Judgment.

F I N I S.